No. 15,078

IN THE

United States Court of Appeals

For the Ninth Circuit

CRISTOBAL C. HINES,
Appellant,

vs.

JOAQUIN A. PEREZ,
Appellee.

On Appeal from the District Court of Guam for the Unincorporated Territory of Guam.

APPELLANT'S OPENING BRIEF.

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JURISDICTIONAL STATEMENT.

Appellee brought this action against appellant in the District Court of Guam for the Unincorporated Territory of Guam to recover the sum of $20,767.07 allegedly due him under a written contract with appellant (C-4).* Jurisdiction of the District Court of Guam for the Unincorporated Territory of Guam is vested in that Court by the Organic Act of Guam, 48 USC 1421. The case was tried without a jury before the Honorable Paul D. Shriver, Judge of the District

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*References are to pages in the Transcript of Record on file herein.

Court of Guam for the Unincorporated Territory of Guam. On October 26, 1955, the Court rendered its oral decision in favor of appellee (27). Premature Notice of Appeal was filed by appellant on November 9, 1955 (14). Findings of Fact and Conclusions of Law were signed by the Court and entered in the Civil Docket on December 16, 1955, *nunc pro tunc* as of November 14, 1955 (15-22). Judgment for appellee in the sum of $38,995.12 was entered on December 16, 1955, *nunc pro tunc* as of November 14, 1955 (22-23). On January 3, 1955, appellant filed his Notice of Appeal (24). The jurisdiction of this Court is invoked under the Organic Act of Guam, 48 USC 1424a.

STATUTES INVOLVED.

Constitution of the United States.

Art. III, Sec. 1

"The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . ."

Art. I, Sec. 8, Clause 9

"The Congress shall have Power . . . to constitute Tribunals inferior to the Supreme Court."

Art. IV, Sec. 3, Clause 2

"The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ."

The Organic Act of Guam, 48 USC 1424a

"There is created a court of record to be designated the 'District Court of Guam', and the judicial authority of Guam shall be vested in the District Court of Guam and in such court or courts as may have been or may hereafter be established by the laws of Guam. The District Court of Guam shall have, in all causes arising under the laws of the United States as such court is defined in section 451 of Title 28, and shall have original jurisdiction in all other causes in Guam, jurisdiction over which has not been transferred by the legislature to other court or courts established by it, and shall have such appellate jurisdiction as the legislature may determine. The jurisdiction of and the procedure in the courts of Guam other than the District Court of Guam shall be prescribed by the laws of Guam."

Federal Rules of Civil Procedure

Rule 52

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a

master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, effective March 19, 1948. (b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment of court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

Rule 58. Entry of Judgment

"Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for

other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The notation of a judgment in the civil docket as provided by Rule 79(a) constitutes the entry of the judgment; and the judgment is not effective before such entry. The entry of the judgment shall not be delayed for the taxing of costs. As amended Dec. 27, 1946, effective March 19, 1948."

STATEMENT OF THE CASE.

This is an appeal by defendant-appellant from a judgment for plaintiff-appellee in the sum of $38,-995.12. The action was brought by plaintiff Joaquin A. Perez for damages for breach of a contract for the sale of corporate shares owned by him and sold to defendant Cristobal C. Hines. Defendant's motion to dismiss the case for failure to state a claim was denied and he thereupon filed his answer.

ISSUES.

The issues presented by this appeal are:

1. Should the District Court have granted appellant's motion to dismiss the action on the ground that it was premature?

2. Did the District Court err in failing to find on a material issue of fact?

3. Did the District Court err in directing that the interest on the judgment should commence prior to the date of the entry of judgment?

4. Did the District Court err in assessing costs against appellant?

5. Did the District Court err in granting judgment when the cause of action alleged in the complaint was not proved?

STATEMENT OF FACTS.

Appellee, Joaquin A. Perez, was the vice president and a stockholder in the Island Service Company, a Guam corporation, hereinafter referred to as the corporation. He agreed to sell his 25 shares of stock, par value $25.00 per share, to appellant, Cristobal Hines. A written agreement of sale was drafted, executed and dated September 29, 1952. At the time of the drafting and execution of the agreement both parties were present represented by counsel (33-34).

The contract provided that the purchase price of the stock would be the actual value as that term was defined by the agreement. Paragraph 3 (a) of the agreement provided as follows:

"The term 'actual value' as used herein shall be determined as follows:

"(a) Hines hereby designates Ireneo Viray, and Perez hereby designates Stanley Kaneshiro, which two individuals will jointly audit the books and records of Island Service Company, Inc. from the inception thereof, to and including October 1, 1952. After said joint audit has been completed, Robert Wiseman shall review the results of said audit and shall attempt to reconcile any differences that may have arisen therein.

After such review the results of said audit shall be presented to Crain and Phelan and Lyle H. Turner, the attorneys for the respective parties. In the event any difference of opinion should result between said counsel as a result of said audit, either party hereto shall have the right to take said difference of opinion into any Court with jurisdiction thereof in order that said difference may be resolved. Any such recourse to Court will be limited to resolving any difference that the parties hereto have been unable to resolve." (5-6)

The agreement also provided that the value of all fixtures except fixtures attached to the realty which were not mechanical contrivances should be determined by two appraisers, one selected by each party. Paragraph 3 (e) provided as follows:

"All other fixtures, including rolling stock, mechanical fixtures attached to realty, etc., shall be valued at their actual value as of October 1, 1952. For the purpose of determining said actual value, Perez shall select an appraiser, and does hereby select Jack Lathrop, subject to the right to substitute another appraiser in the event said Jack Lathrop does not agree to act as appraiser or is otherwise unavailable, and Hines shall designate an appraiser on or before Friday, October 3, 1952. In the event said two appraisers are unable to agree upon the value of any asset, as of October 1, 1952, they shall select a third appraiser whose decision on the value of said assets shall be final." (7)

Pursuant to the request of appellee's attorney, Kaneshiro conducted an audit of the corporation and

prepared a balance sheet as of September 30, 1952 (41-42). Viray conducted an audit and prepared a balance sheet as of September 29, 1952 (69-70). Viray took over a year to complete his audit (68). Kaneshiro completed his audit in "a very short time". He went through the records and waited for Viray to catch up (60). The two auditors reached different results on nearly every item on the respective balance sheets, e.g. cash on hand and in banks (70, 43), accounts receivable (73, 44) inventory, merchandise (76, 45), inventory, automobiles (77, 45), buildings (77, 48), office equipment (79, 47), furniture and fixtures (79, 47), notes payable (83, 50), accounts payable (82, 49) and drafts payable (82, 50). Viray determined the actual value of the corporation to be $79,-601.91. Kaneshiro determined the actual value of the corporation to be $121,228.67 (18-19).

Pursuant to a request to attempt to reconcile the differences in Kaneshiro's and Viray's audits, Sherwood Wiseman met with the two auditors about 5 times (121-122). Wiseman did not look at the books of the corporation because it was agreed before he "went into this contract" that he would not (178). He discussed with the two auditors the various items of their respective balance sheets and the data supporting them. Wiseman made 6 adjusting entries to Kaneshiro's audit and 19 adjusting entries to Viray's audit (124, 128, 132). He also added to both balance sheets a note receivable of $850.00 which had not been on the books and accrued income tax in the sum of $10,903.79, neither of which items had previously appeared on either balance sheet (127). After Wise-

man's adjustments, the actual value as shown on Viray's balance sheet was $155,625.95 and the actual value as shown on Kaneshiro's balance sheet was $152,833.02 (19).

Meanwhile, Lathrop, appointed by appellee, and Forkner, appointed by appellant, each made separate and independant appraisals of fixtures not attached to the realty. Forkner appraised the value of the assets at $22,349.00 and Lathrop appraised their value at $41,036.00 (18).

By summer of 1953, no third appraiser had been selected to reconcile the differences in the two appraisals (187). Crain, appellant's attorney and Turner, appellee's attorney, had several discussions concerning the necessity of securing a third appraisal. Crain suggested to Turner that in order to expedite bringing the matter to a conclusion they select a third appraiser. The two attorneys discussed the men who would be competent to make the appraisal who were at that time available in Guam. Crain suggested Henry Schwendinger as a third appraiser. Turner and he agreed that the next time that Schwendinger was in Guam, he would make the third appraisal. Crain, therefore, asked Schwendinger to make the appraisal. Schwendinger made an appraisal in the amount of $11,329.00 and submitted it to Crain who, when Turner next returned to Guam, discussed the matter with him and gave him Schwendinger's appraisal. A few weeks later, the appraisal was returned to Crain by Turner who told him that his client, appellee, refused to accept the appraisal (187-189).

Thereafter, Lathrop told Turner that he and Forkner had selected a third appraiser. Norris, that appraiser, made a separate and independent appraisal. He did not discuss with Forkner and Lathrop their appraisals or see their reports either before or after the time that he made his appraisals (202, 161). Norris appraised the value of the assets at $34,391.00 (18).

The Court found the value of the assets in accordance with Norris' appraisal. He stated that he rejected Schwendinger's appraisal because he felt that it did not reflect the true market value of the assets (210).

The Court made a separate finding on each item of the balance sheets and determined the actual value of the corporation to be $155,980.51 (20).

ARGUMENT.

I.

THE DISTRICT COURT SHOULD HAVE GRANTED APPELLANT'S MOTION TO DISMISS THE ACTION ON THE GROUND OF PREMATURITY.

The action by appellee for breach of contract was premature because the conditions precedent to suit as expressed in the contract of the parties had not been met at the time that the action was filed. Under the contract either party had the right to take any difference of opinion to the Court only after the contract procedures for ascertaining the actual value of the shares had been followed. At the time of the filing of the present action there had been no compliance with those procedures.

Appellee's complaint alleged a breach of contract and prayed damages therefor. He alleged that he had demanded the alleged actual value of the shares ($40,-767.57) from appellant and that he had refused to pay it (4). Appellant moved to dismiss the complaint on the ground that the methods provided in the contract for the ascertainment of the value of the shares had not been followed (183). Until the methods for the ascertainment of the value of the shares were complied with, appellant was not liable under the contract to pay the purchase price. Before appellant's liability to pay the purchase price had arisen, there could be no breach of contract. Appellee's action was premature and the Court should have granted appellant's motion to dismiss.

It is a well settled rule of law that an action may not be maintained until the cause of action accrues and that if the action is commenced before that time, it must be dismissed on the ground of prematurity.

Adams v. Albany, 80 F. Supp. 876, 881;

American Bonding & Trust Co. v. Gibson County, 145 F. 871, 874;

Berkowitz v. Palm Springs La Guinta Develop. Co., 37 C.A. 2d 249, 99 P. 2d 372, 373.

An action to recover the purchase price under a contract of sale must be dismissed if, at the time of the commencement of the suit, conditions precedent to the payment of the purchase price have not been met.

Tatum v. Ackerman, 148 Cal. 357, 83 P. 151, 153.

It is elementary in the law of contracts that before a conditional contract may become operative, its conditions must have been performed.

As the California Supreme Court held in *McKenzie v. Scottish Union & National Insurance Co.,* 112 C. 548, 44 P. 922, when a condition precedent is adopted by parties in their agreement, Courts will exact a substantial if not a strict observance of the conditions before ordering a judgment thereon (Cited in *Peterson v. Montgomery Holding Co.,* 89 C.A. 2d 890, 202 P. 2d 365).

When parties contract, and place conditions in their agreement, their agreement can only be consummated in the event of the existence of those facts called for in the agreement. If those conditions do not come about, there can be no agreement as the parties initially contemplated. There can be a new understanding, but that would bring into being a different contract. No one can acquire rights under a promise, which in terms is conditional, unless the condition happens or is performed.

> *Lober v. Canadian Pac. Rej. Co.,* 151 F. 2d 758, Cert. Den. 66 S. Ct. 490, 326 U.S. 797, 90 L. ed. 485 (CCA Minn.).

What conditions were not fulfilled prior to the filing of this action?

First, the contract provided that Viray and Kaneshiro should "jointly audit" the books and records of the corporation (6). Although Kaneshiro did testify to the conclusion that his audit was made "jointly" with Viray (41) and although the testimony of

the two auditors is in conflict in regard to how much they cooperated in their separate audits of the books, it is clear that no joint audit as was contemplated by the contract was ever made.

The work "joint" is defined as "done or produced by two or more working together".

Webster's New International Dictionary, 2nd ed.;

Arndt v. Brockhausen, 3 A. 2d 384, 386;

Barr v. Missouri Pacific R. Co., 37 S.W. 2d 927, 930.

The two auditors failed to produce an audit, working together. Their separate audits took different periods of time to conduct, they covered different periods of time and each auditor made separate balance sheets with divergent conclusions. Viray testified that they each conducted two separate audits working alone, that each came up with separate results and that when he showed his results to Kaneshiro, the latter did not agree with him (96-98). Mr. Viray (96) stated: "He made his audit and I made my audit. I mean, he worked alone and I worked alone, but we worked in one office at the same time". Mr. Kaneshiro (60) stated, "I went through the records and arrived at certain figures and waited for Mr. Viray to catch up." To say in the face of the testimony by the two auditors that there was a joint audit would be ridiculous.

There must be certainly more cooperation between two people for a concurrence of action. Moreover, cooperation was imperative because of the peculiar facts of this case.

Mr. Kaneshiro was intimately connected with the so-called books of the corporation. Mr. Viray was an outside accountant as far as knowledge of the corporate records went. And, most important of all, the records were incomplete, according to the testimony of both Viray and Kaneshiro. It may be true that Mr. Kaneshiro could get all the information he wanted regarding the corporate finances from the books as he claimed, but it would have been all but impossible for even the most competent certified public accountant to conduct a fair audit without explanation of the missing supporting data.

Despite this situation when Mr. Viray found differences, Mr. Kaneshiro gave no explanation, he only "disagreed with me." (99).

There was, therefore, no joint audit as the parties must have contemplated it. But the Court failed to find on the issue of whether or not a joint audit was conducted. It merely found that the two accountants audited the books of the corporation (18).

As a second condition precedent, the contract provided that "after said joint audit has been completed, Robert Wiseman shall review said audit and shall attempt to reconcile any differences that may have arisen therein". Even granting that the audits were joint, the reconciling accountant, Wiseman, could not have but noticed the disparity in the two conclusions. Viray's audit was $79,601.91; Kaneshiro's $121,228.67. There was more than a $40,000.00 difference!

Notwithstanding that $40,000.00, Wiseman used Kaneshiro's audit as a control. He made no attempt

at a real reconciliation. He merely took for granted that Kaneshiro's audit was correct because Kaneshiro had the more thorough knowledge of the Island Service Company's books. With that bias, a third party could not make a fair evaluation of the two audits.

He could only go through both audits and, in effect, substitute in the "incorrect audit" the figures of the "correct" audit.

This is exactly what Wiseman did. He did not go back to the original books to check even the great disparities. He adjusted Viray's to fit Kaneshiro's. He did not question the parts of both audits rendered obscure by the paucity and, in cases, complete lack of records. He merely resolved every difference in the audits in favor of Kaneshiro. The contract did not give Wiseman the authority to change items in the balance sheet which were not in dispute. Contrary to the direction in the contract of the parties, Wiseman added to each balance sheet items which had not been on either auditor's balance sheet previously and deleted items which both had previously included in their respective balance sheets. The contract certainly did not contemplate that Wiseman should reconcile the differences between the auditors in such a manner that after his "reconciliation", the net worth of the corporation would be nearly $30,000.00 more than either auditor had determined before reconciliation.

If this were a reconciliation, it certainly was not one that could possibly have been contemplated by Mr. Hines at the time he entered into the contract.

Third. The contract further contemplated that when the result of the audit was presented to the respective counsel of the parties, they should try to reconcile any differences. No such attempt was made.

Fourth. The contract contemplated that the two appraisers selected by the parties should appraise each item together and that, in the event that they should not agree on the correct appraisal to be given any item, the value of that asset should be presented for the decision of the third appraiser. Instead of following the contract, the two appraisers each conducted an independent appraisal of the assets, without the benefit of the knowledge of the opinion of the other appraiser. As was inevitable under such a procedure, their results were not identical. Therefore, it was necessary to have a third appraiser. The third appraiser, instead of comparing the appraisals of the other two upon disputed items, made a complete, independent appraisal of all assets. If such a procedure was what was contemplated by the contract, it would not have provided for the first two appraisals.

Since the methods provided in the contract for the determination of the actual value of the corporation had not been followed at the time of the filing of the complaint, there was, therefore, neither a strict nor a substantial observance of the conditions of the contract as would entitle a Court to render a judgment on the contract (cf. *McKenzie v. Scottish Union & National Insurance Company,* 112 C. 548, 44 P. 922). At that time appellant was not yet liable to pay anything and he did not breach the contract in failing to

pay the sum appellee demanded. Since a cause of action for breach of contract had not accrued, the Court should have granted appellant's motion to dismiss on the ground of prematurity. It was not the Court's proper function to disregard the contract of the parties and make his own evaluation of the actual value of the corporation, at a figure higher than each of the figures of the two auditors.

The trial Court substituted a different set of conditions for those stipulated in the contract.

The Court was without authority to make such a substitution. Contracting parties are entitled to the method of appraisement as provided for in the contract and any decree of the Court not in conformance therewith amounts to a modification of the vested rights under the contract. *Luedinghaus Lumber Co. et al. v. Luedinghaus et al.,* 299 F. 111, 9th Circuit.

The appellant, therefore, was entitled to a dismissal of the action.

II.

THE COURT ERRED IN FAILING TO MAKE FINDING ON MATERIAL ISSUES OF FACT.

Rule 52(a) of the Federal Rules of Civil Procedure requires that "in all actions tried upon the facts without a jury, the Court shall find the facts specially and state separately its conclusions of law thereon . . ."

Findings of fact on every material issue are mandatory and there must be such subsidiary findings of

fact as will support the ultimate conclusion reached by the Court. *Kweskin v. Finkelstein,* 223 F. 2d 677, 678. The trial Court's findings should be so explicit as to give the reviewing Court a clear understanding of the basis of the trial Court's decision and to enable the reviewing Court to determine the grounds upon which the trial Court reached its conclusions. *Maher v. Hendrickson,* 188 F. 2d 700; *Irish v. United States,* 225 F. 2d 3, 8.

The failure to find an ultimate fact is deemed a finding against the party having the burden of proof, and, on appeal, all facts not embraced in special findings will be regarded as not proved by the party having the burden of proof. *Shapiro v. Rubens,* 166 F. 2d 659, 667.

The Court failed to make findings on three material issues:

1. The issue of whether or not counsel for the parties, as the agents of the parties, had succeeded in making an executed oral modification of the written contract when they agreed that they would select a third appraiser and selected Schwendinger who then made the appraisal.

2. The issue of whether or not Kaneshiro and Viray conducted a "joint audit".

3. The issue of whether or not there was ever a breach of the contract. (This latter issue is one of ultimate fact.)

On the evidence before it, the Court could have found that counsel for the parties, as the agents of

the parties, had made an executed oral modification of the written contract when they agreed that they would select the third appraiser, and selected Schwendinger who made the appraisal.

A contract in writing may be altered by a contract, in writing, or by an executed oral agreement, and not otherwise. *Guam Civil Code,* Section 1698.

Crain, attorney for appellant, testified that he and Turner, attorney for appellee, agreed that they would select the third appraiser in order to bring the matter to a conclusion, that they agreed upon Schwendinger as the appraiser, that Schwendinger then made his appraisal, and that after the appraisal was submitted to Turner, Schwendinger was rejected. Turner had been acting for appellee in all phases of the negotiation and execution of the contract of sale of the stock. It could be inferred that he had authority to make such a modification of the contract. Even lacking actual authority, it could have been found that he had apparent authority to do so.

A principal is bound not only by the acts of his agent which he has actually authorized, but also by those acts which he has allowed third persons to believe him authorized to perform. *Hicks v. Wilson,* 197 Cal. 269, 240 P. 289, 290.

If Crain had not relied upon Turner's apparent authority to make such a modification, he could have obtained appellee's consent before the appraisal was made and before appellee saw the low appraisal made by Schwendinger.

Turner's testimony, of course, was somewhat inconsistent with Crain's, but if the Court had believed Crain's version of the occurrence, it could have found that by oral modification Schwendinger was the third appraiser. Once the contract had been modified to provide that the attorneys would choose the third appraiser, the other two appraisers no longer had the authority to select a third appraiser in the absence of Crain's agreement to their selection. The Court misinterpreted its function in regard to the third appraiser. It was not to judge the appraisement, as it did. Because the contract provided that the third appraiser's decision was to be final, the only function of the Court was to determine which as between Norris and Schwendinger was properly selected as the third appraiser. This the Court failed to do. Instead, the Court selected Norris' appraisement because he felt that it more truly reflected market value. The Court erred in failing to find which of the two men was properly selected as the third appraiser.

The Court also erred in failing to find whether or not a joint audit had been conducted by Kaneshiro and Viray. Such a joint audit was a condition precedent to the ascertainment of the purchase price of the shares. Therefore, it was a material issue of the case.

The Court further failed to find on the issue of breach of contract. Since breach of contract was an ultimate fact, it must be deemed a finding against appellee who had the burden of proof on the issue.

III.

THE DISTRICT COURT ERRED IN DIRECTING THAT INTEREST ON THE JUDGMENT SHOULD COMMENCE PRIOR TO THE DATE OF ITS ENTRY.

Interest on a judgment is calculated "from the date of the entry of the judgment". *Federal Rules of Civil Procedure,* Rule 58.

The Court's judgment ordered appellant to pay interest at the rate of 6% if the sum of $15,000.00 was not paid on or before November 10, 1955. The judgment was entered on December 16, 1955, *nunc pro tunc* as of *November 14, 1955,* four days after the date for the commencement of interest (22-23). The Court had no power to order interest to be paid on the judgment prior to the date of its entry.

IV.

THE DISTRICT COURT ERRED IN AWARDING COSTS TO APPELLEE.

The Court awarded costs in the sum of $645.23 to appellee (23). Appellant moved for a review of the action of the clerk in taxing costs. The Court, after reviewing the costs, ordered that costs should be allowed as taxed by the clerk (29).

Costs should be allowed to "the prevailing party". *Federal Rules of Civil Procedure,* Rule 54(d).

Appellee was not the prevailing party. Appellant has never disputed the fact that he owed appellee a sum of money equal to the actual value of the shares nor that the actual value should be determined as

provided in the contract. The dispute between the parties concerned which sum of money was the actual value of the shares as determined as provided in the contract. Appellee alleged in his complaint that the actual value was $40,767.57 (3-4). The Court determined that he was incorrect and that the actual value was $38,995.12 (21). Therefore, appellee did not prevail on the only issue in dispute between the parties to the action. Neither party prevailed.

When neither of the parties to an action prevails, neither is entitled to an award of costs. In *Hart v. Casterton,* 227 N.W. 183, 184, the Court, in construing a statute providing that costs should be awarded to the "prevailing party", held that where neither party to the action was wholly successful, neither was the prevailing party and neither was entitled to costs. See also *McCrary v. New York Life Ins. Co.,* 84 F. 2d 790, 795, where the Court held that a beneficiary under a life insurance policy who sued for double indemnity and who recovered the face value of the policy less a loan on it, which amount had been tendered by the insurer before the suit, was not the "prevailing party" and was not entitled to costs.

The Court in *Lueben v. Metten,* 100 P. 2d 935, 937, described the reason for awarding costs as follows:

> "Costs are said to be in the nature of incidental damages allowed to the successful party to indemnify him against the expense of asserting his rights in court, when the necessity for so doing was caused by the other's breach of legal duty."

It was not appellant who caused the necessity of having the Court determine the actual value of the shares. That necessity was caused by the inability of both parties to agree. Appellee's demand was of a sum in excess of that determined by the Court to be the actual value of the shares.

V.

APPELLEE DID NOT RECOVER UPON THE CAUSE OF ACTION ALLEGED IN HIS COMPLAINT.

In his complaint appellee alleged a cause of action for breach of contract and prayed damages therefor. The proof failed to show a breach of contract. The District Court awarded appellee either specific performance or declaratory relief, contrary to the complaint and to the contract of the parties.

CONCLUSION.

For the reasons above stated it is respectfully submitted that the judgment appealed from should be reversed.

Dated, San Francisco, California,
August 24, 1956.

Respectfully submitted,
E. R. Crain,
Thomas M. Jenkins,
Attorneys for Appellant.